STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 29, 2008
v	No. 273577 Saginaw Circuit Court
CHARLES HENRY ARTHUR, Defendant-Appellant.	LC No. 03-022744-FC

Before: Schuette, P.J., and Borrello and Gleicher, JJ.

GLEICHER, J. (*dissenting*).

I respectfully dissent from the majority's conclusion that "defendant failed to assert his desire to represent himself unequivocally."

The transcript of the hearing conducted on February 14, 2005, reveals an unequivocal request for self-representation:

> *Defendant:* Honorable Kaczmarek?
>
> *The Court:* Go ahead.
>
> *Defendant:* Throughout the rest of these proceedings, I just would like to address the Court, let the Court know that I will be representing myself. Russell J. Perry [defendant's assigned counsel] will no longer be representing me throughout the rest of these proceedings.
>
> *The Court:* Well, I make that decision, sir, and you'll have to file a motion on that, but the motion to adjourn is granted. You can file a motion to have Mr. Perry off the case. We'll have to take that up at another–
>
> *Defendant:* No. I'm representing myself.
>
> *The Court:* Sir, I tell–
>
> *Mr. Perry:* May I approach?
>
> *The Court:* I make that decision, you don't, and you are represented–

Defendant: You cannot deny my constitutional rights, your Honor.

The Court: Well, you can file a grievance, sir, *but I am not going to let you represent yourself. Is that clear?*

Defendant: No, it's not, sir.

The Court: Well, you're [sic] hearing is terminated for today, and you'll be back, I'm sure. [Emphasis added.]

Defendant expressed his desire to represent himself clearly, without hesitation or vacillation. In my view, the colloquy quoted above represents an unambiguous request for self-representation and is reasonably susceptible of no other interpretation.

The right to represent oneself in a criminal trial is implicitly embodied in the Sixth Amendment. *Faretta v California*, 422 US 806, 814; 95 S Ct 2525, 2530; 45 L Ed 2d 562 (1975). In *Faretta*, a public defender initially represented the defendant. Well in advance of trial, Faretta requested the opportunity to proceed without counsel. Initially, the trial judge acquiesced. Several weeks later, however, the judge conducted a hearing to inquire into Faretta's legal skills, and ruled that Faretta did not have a constitutional right to conduct his own defense. A public defender represented Faretta throughout the trial, which resulted in conviction. *Id*. at 807-811.

The United States Supreme Court reversed Faretta's conviction on Sixth Amendment grounds, explaining that "counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant–not an organ of the State interposed between an unwilling defendant and his right to defend himself personally." *Id.* at 820. The Supreme Court expressly recognized that in most situations, criminal defendants "could better defend with counsel's guidance than by their own unskilled efforts." *Id.* at 834. Nonetheless, the Supreme Court held that when a defendant seeks self-representation, the central question is whether a waiver of counsel is "clear and unequivocal," and "knowingly and intelligently" made. *Id.* at 835.

In *People v Adkins (After Remand)*, 452 Mich 702; 551 NW2d 108 (1996), criticized on other grounds in *People v Williams*, 470 Mich 634, 641 n 7; 683 NW2d 597 (2004), our Supreme Court held that the Michigan Constitution and a state statute explicitly provide criminal defendants with the right to represent themselves. Const 1963, art 1, § 13; MCL 763.1. A judicial grant of a defendant's request for self-representation depends on "[p]roper compliance with the waiver of counsel procedures" set forth by our Supreme Court. *Id*. at 720-721. Those procedures require "that the court engage, on the record, in a methodical assessment of the wisdom of self-representation by the defendant." *Id.* at 721. Before granting a request for self-representation, the court must conclude that the defendant has intentionally relinquished or abandoned the right to counsel, and should "indulge every reasonable presumption against waiver of that right." *Id*. (internal quotation omitted). If the court determines through an appropriate and focused inquiry that a defendant's election of self-representation is unequivocal, knowing, intelligent and voluntary, the court must respect the defendant's choice, as long as

doing so will not unduly disrupt, inconvenience and burden the court. *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976).[1] "Application of the waiver of counsel procedures is the duty of the court." *Adkins, supra* at 723.

At the hearing on February 14, 2005, defendant twice told the court that he wished to represent himself. The court responded that it would not allow him to do so in an emphatic manner, adding, "Is that clear?" Defendant refused to acquiesce, stating, "You cannot deny my constitutional rights, your Honor." Defendant's election of self-representation was unqualified and forthright. His words evinced neither equivocation nor hesitation. When defendant requested recognition of his Sixth Amendment right to waive counsel, it became the duty of the trial court to undertake the inquiry described in *Anderson* and MCR 6.005(D). That inquiry consists of an examination, on the record, of whether defendant's stated choice was voluntary, knowing and intelligent, in light of the charges and possible prison sentences he faced. *Adkins, supra* at 722-727.[2]

The majority concludes that defendant "failed to assert his desire to represent himself unequivocally," and then, in my view, mischaracterizes the events that followed defendant's assertion of his self-representation right. It is difficult to image a more unequivocal waiver of counsel than defendant's twice-repeated request to represent himself, coupled with a specific reference to the constitutional nature of this right. Further, defendant's subsequent conduct does not support the majority's contention that "defendant wanted counsel."

The record reveals that defendant expressed dissatisfaction with appointed counsel at the outset of the case. The trial court heard appointed counsel's first motion to withdraw on November 8, 2004. At that hearing, defense counsel stated that defendant was "very articulate and quite capable of expressing his feelings in the written form," and that there had been an "absolute breakdown of communication" that compromised counsel's ability to provide a defense. Counsel requested the appointment of a new lawyer, and defendant concurred. Defendant proceeded to proffer arguments on his own, without interruption or assistance from his counsel, regarding the evidence and a photographic array that had been presented to a witness. Before the hearing concluded, the trial court responded, "Thank you for sharing that with us. I'm going to deny the motion," without offering any additional analysis or explanation.

The next hearing, conducted on December 6, 2004, involved a motion to dismiss on double jeopardy grounds. At the outset, defendant asked, "Excuse me, your Honor. Judge Kaczmarek, may I speak, please?" The trial court responded, "No." After his attorney argued the motion, defendant again expressed dissatisfaction with his counsel's general performance, and stated, "I can't go no farther with this attorney. … I do not trust him, you know. I [sic] more scared of him then [sic] I am of [the prosecutor], and that's the honest to God truth, and

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[1] In *Adkins*, *supra* at 726-727, the Supreme Court held that trial courts must "substantially comply" with the waiver of counsel provisions set forth in *Anderson* and MCR 6.005(D).

[2] "[T]he rule articulated in *Adkins* provides a practical, salutary tool to be used to avoid rewarding gamesmanship as well as to avoid the creation of appellate parachutes. …" *People v Russell*, 471 Mich 182, 192; 684 NW2d 745 (2004).

you all [sic] forcing me to continue on through court with an attorney that I don't trust." Defendant then asked the trial court, "Would you allow this attorney to step down, man?" The trial court responded only, "He will remain. Thank you."

On January 19, 2005, appointed counsel filed a motion to produce evidence and for court-appointed experts. In this motion, counsel stated, "The Defendant requested of counsel that a motion asking for the same or similar relief be filed as he has written it. I am attaching a copy of that motion and incorporating it herein." The two-page motion and four-page brief prepared by defendant are part of the court file.

The next hearing occurred on February 14, 2005, and virtually the entire transcript is quoted above. This hearing began with defense counsel's motion to adjourn the trial, and ended with the trial court's abrupt refusal to allow defendant to represent himself. The majority concludes that because defendant did not "file a motion" after this hearing, and "never renewed his request to represent himself," he waived his self-representation right.[3] The majority cites no authority in support of this legal principle. Indeed, there is no basis for requiring defendant to "file a motion," since his oral request for self-representation at the February 14, 2005 hearing qualified as a motion. MCR 2.119(A)(1).[4]

In any event, it is difficult for me to believe that a written motion for self-representation would have changed the trial court's mind, or altered its approach. The trial court was every bit as "unequivocal" in denying defendant's right to self-representation as defendant was in asserting that right. Further, no authority supports the proposition that defendant was required to "file a motion" to perfect his constitutional right to self-representation. *Faretta* itself rebuts the majority's analysis here. The United States Supreme Court held in *Faretta* that the trial court erred when it conditioned the defendant's right to proceed pro se on "technical legal knowledge," rather than Faretta's "knowing exercise of the right to defend himself." *Id*. at 835-836. The right to self-representation may not be conditioned upon an ability to explain the exceptions to the rule against hearsay, and it may not be predicated on recitation of "some talismanic formula" intended to "open the eyes and ears of the court to his request." *Dorman v Wainwright*, 798 F2d 1358, 1366 (CA 11, 1986). "[T]he law simply requires an affirmative, unequivocal, request, and does not require that request to be written or in the form of a formal motion filed with the court." *Buhl v Cooksey*, 233 F3d 783, 792 (CA 3, 2000).

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[3] In fact, defendant continued to protest the trial court's decision. He filed a motion to disqualify the trial court, citing its refusal to allow defendant to represent himself. Additionally, at an evidentiary hearing conducted on August 23, 2005, defendant attempted to object to testimony provided by a police officer, as follows:

Defendant: Judge Kaczmarek, I object.

The Court: Sir, if you don't keep quiet, I will have you restrained. We are going to conduct this without your interruption. …"

[4] This court rule applies to criminal and civil cases, pursuant to MCR 6.001(D).

Nor is there any legal basis to require a defendant to renew a request for self-representation. "After a clear denial of the request, a defendant need not make fruitless motions or forego cooperation with defense counsel in order to preserve the issue on appeal." *Brown v Wainwright*, 665 F2d 607, 612 (CA 5, 1982). On February 14, 2005, the trial court firmly and decisively closed the door on defendant's right of self-representation. In essence, the trial court held that defendant had no such right.[5] I believe that the majority errs by presuming a waiver of a right never recognized or afforded. *See, e.g.*, *Johnson v Zerbst*, 304 US 458, 464; 58 S Ct 1019; 82 L Ed 1461 (1938) (stating that "we do not presume acquiescence in the loss of fundamental rights"). An issue is not waived by a party's failure to assert a futile objection. *Baker v Wayne Co Rd Comm'rs*, 185 Mich App 82, 86-87; 460 NW2d 566 (1990). Defendant's failure to renew his request reflects an implicit concession that he would never successfully persuade the trial court to permit self-representation, and nothing more.

Despite the horrific nature of the crimes for which defendant stood trial, and the abundant evidence of his guilt, I cannot agree to affirm his convictions without abandoning the fundamental constitutional principle of *Faretta*, as well as the right that the drafters of the Michigan Constitution placed at art 1, § 13. I believe that the denial of defendant's clearly and repeatedly requested right to self-representation is a structural error, and that automatic reversal is required. *People v Knight*, 473 Mich 324, 369 n 11 (opinion by Cavanagh, J., concurring in part and dissenting in part); 701 NW2d 715 (2005).

/s/ Elizabeth L. Gleicher

[5] Had the trial court recognized that defendant possibly had a right to represent himself, it would have embarked upon the dialogue mandated by MCR 6.005(D). The record reflects that the trial court made no effort to comply with the waiver of counsel procedures detailed in *Anderson*, *supra*, and did not come close to "substantial compliance," as required in *Adkins*, *supra*.